

No. \_\_\_\_\_

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# In the Supreme Court of Texas

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IN RE TEXAS HOUSE REPUBLICAN CAUCUS PAC, *et al.*  
*Relators.*

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Direct Original Proceeding Under TEX. ELEC. CODE § 273.061

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## PETITION FOR WRIT OF MANDAMUS

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**National Republican Congressional Committee**

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**Senator Larry Taylor (SD 11)**

**Senator Pete Flores (SD 19)**

**Rep. Cody Harris (HD 8)**

**Justin Berry (HD 47)**

**Rep. Phil King (HD 61)**

**Rep. Phil Stephenson (HD 85)**

**Rep. Candy Noble (HD 89)**

**Rep. Dan Huberty (HD 127)**

**Rep. Jim Murphy (HD 133)**

**Rep. Valoree Swanson (HD 150)**

**Rep. Louis Gohmert (CD 1)**

**Rep. Dan Crenshaw (CD 2)**

**Rep. Van Taylor (CD 3)**

**Wesley Hunt (CD 7)**

**Rep. Michael McCaul (CD 10)**

**Rep. Kay Granger (CD 12)**

**Rep. Jodey Arrington (CD 19)**

**Rep. Chip Roy (CD 21)**

**Troy Nehls (CD 22)**

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**Rep. Roger Williams (CD 25)**

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**James Harren**



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**Lou Antonelli**



**Melanie A. Black**



**Shawn Kelly**



**Chris Duncan**



**Jose R. Sosa**



**Roy Eriksen**



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**Trey Holcomb**



**Jack B. Westbrook**



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## **Statement of the Case**

### ***Nature of Proceeding***

Texas law requires a candidate for public office to pay a filing fee or submit a petition in lieu of a filing fee. Candidates seeking public office as members of the Libertarian Party of Texas refused to pay filing fees. The Libertarian Party of Texas and its Chair have a legal duty to reject these applications. Despite demand to do so, the Party and its Chair refuse to comply with their legal obligations.

This is an original proceeding under Texas Election Code Section 273.061 to compel the Libertarian Party of Texas and its Chair to comply with their legal obligation to reject applications of candidates that failed to pay the required fee. This Court has original jurisdiction to issue a writ of mandamus to compel performance of an obligation “in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.” TEX. ELEC. CODE § 273.061. This action, under Chapter 141 of the Election Code, is timely as the deadline—September 18—has not passed.

For further explanation, please see: **Relief Requested in this Original Proceeding.**

### ***Relators***

Texas House Republican Caucus PAC  
National Republican Congressional Committee  
Senator Pete Flores  
Senator Larry Taylor  
Senator Brandon Creighton  
Rep. Cody Harris  
Rep. Phil Stephenson  
Justin Berry  
Rep. Phil King  
Rep. Candy Noble

Rep. Dan Huberty  
Rep. Jim Murphy  
Rep. Valoree Swanson  
Rep. Louis Gohmert  
Rep. Dan Crenshaw  
Rep. Van Taylor  
Wesley Hunt  
Rep. Michael McCaul  
Rep. Kay Granger  
Rep. Jodey Arrington  
Rep. Chip Roy  
Troy Nehls  
Tony Gonzales  
Beth Van Duyne  
Rep. Roger Williams  
Rep. Michael Cloud  
Rep. John Carter  
Genevieve Collins  
Rep. Brian Babin  
Republican Party of Harris County  
Republican Party of Travis County  
Republican Party of Tarrant County

***Respondents***

Libertarian Party of Texas  
Whitney Bilyeu, in her capacity as  
Chair of the Libertarian Party of Texas

***Real Parties  
in Interest***

Mark Ash (Chief Justice, Supreme Court)  
William Bryan Strange, III (Justice Pl. 7. Tex. Sup. Ct.)  
Cameron Brock (Tex. SD 4)  
Jared Wissel (Tex. SD 11)  
Jo-Anne Valvdivia (Tex. SD 19)  
K. Nicole Sprabary (Tex. HD 4)  
R. Edwin Adams (Tex. HD 8)  
Michael Clark (Tex. HD 47)  
J. K. Stephenson (Tex. HD 61)  
Michael L. Miller (Tex. HD 85)  
Ed Kless (Tex. HD 89)

Rod Wingo (Tex. HD 97)  
 Neko Antoniou (Tex. HD 127)  
 James Harren (Tex. HD 133)  
 Jesse Herrera (Tex. HD 150)  
 Elliott Robert Scheirman (U.S. CD 2).  
 Lou Antonelli (U.S. CD 4)  
 Melanie A. Black (U.S. CD 6)  
 Chris Duncan (U.S. CD 8)  
 Jose R. Sosa (U.S. CD 9)  
 Roy Eriksen (U.S. CD 10)  
 Wacey Alpha Cody (U.S. CD 11)  
 Trey Holcomb (U.S. CD 12)  
 Jack B. Westbrook (U.S. CD 13)  
 Ross Lynn Leone (U.S. CD 15)  
 Shawn Kelly (U.S. CD 17)  
 Joe Burnes (U.S. CD 19)  
 Arthur DiBianca (U.S. CD 21)  
 Joseph LeBlanc, Jr. (U.S. CD 22)  
 Beto Villela (U.S. CD 23)  
 Darren Hamilton (U.S. CD 24)  
 Bill Kelsey (U.S. CD 25)  
 Phil Gray (U.S. CD 27)  
 Bekah Congdon (U.S. CD 28)  
 Phil Kurtz (U.S. CD 29)  
 Clark Patterson (U.S. CD 31)  
 Christy Mowrey Peterson (U.S. CD 32)  
 Jason Reeves (U.S. CD 33)  
 Anthony Cristo (U.S. CD 34)  
 Mark Loewe (U.S. CD 35)

***Respondents’  
Action***

Relators demanded Respondents to reject the applications of the Real Parties in Interest that failed to pay the required filing fee. Respondents refused to do so.

***Notice of  
Related  
Proceeding  
Below***

On August 21, 2020, the Third Court of Appeals issued an Opinion regarding the ability of candidates to appear on the general election ballot despite their refusal to pay the required filing fee. *In re Davis*, No. 03-20-00414-CV (Tex. App.—Austin, Aug. 19, 2020, orig. proceeding).

Over the following week, three different cases were filed in the Third Court of Appeals challenging the *eligibility* of Libertarian Party of Texas candidates that failed to pay the filing fees required by law.<sup>1</sup> In all three cases, the Court denied mandamus relief as moot, holding that Texas Election Code Section 145.035 creates a deadline of August 21 (74 days before the election) to declare a candidate ineligible.

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<sup>1</sup> (1) *In re The National Republican Congressional Committee*; Cause No. 03-20-00421-CV; (2) *In re The Republican Party of Travis County, Texas*; Cause No. 03-20-0422-CV.; and (3) *In re Republican Party of Texas House Republican Caucus PAC*, et al, Cause No. 03-20-0424-CV. Each is included in the Appendix.

### **Statement of Jurisdiction**

This Court has jurisdiction to issue a writ of mandamus under Texas Election Code Section 273.061 to compel performance of an obligation “in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.” TEX. ELEC. CODE § 273.061.

This case meets the standards for mandamus relief, given that Respondents have a duty imposed by law to reject the applications of Real Parties in Interest who failed to pay filing fees or file petitions in lieu of the filing fee. *See* TEX. ELEC. CODE §§ 141.041; .032.

Mandamus may originate in this Court. *See* TEX. ELEC. CODE § 273.061; *In re Jones*, No. 05-18-00065-CV, 2018 WL 549531, at \*2 (Tex. App.—Dallas Jan. 24, 2018, orig. proceeding) (mem. op.). Finally, this case is important because it will determine whether candidates who failed to comply Texas Election Code Sections 141.032(a) and 141.041 will appear on the ballot for the 2020 general election. *See In re Hamlin*, No. 05-02-01416-CV, 2002 Tex. App. LEXIS 6630, at \*4 (Tex. App.—Dallas Sep. 11, 2002) (orig. proceeding) For all these reasons, jurisdiction and venue are appropriate in this Court.



## **Introduction**

Candidates who intend to seek a minor party's nomination for statewide or district office must file with the party chair a notarized application and submit the same filing fee or petition in lieu of filing fee that major-party candidates must submit to be eligible to appear on the ballot. If the candidate fails to comply, the party chair *must* reject the application. Certain Libertarian Party candidates refused to submit the filing fee or to file a petition in lieu of the filing fee. Relators brought this to the attention of the Libertarian Party of Texas and its Chair, demanding that they reject the applications or rule such candidates ineligible. The Chair refused to comply with this demand.

## **Relief Requested in this Original Proceeding**

Texas Election Code Section 141.041 requires a candidate seeking to appear on the general election ballot to pay a filing fee or submit a petition in lieu of a filing fee. TEX. ELEC. CODE § 141.0141. This is a new law, creating some confusion as to its application and the method to obtain relief. *See In re Davis*, Cause No. 03-20-00414-CV (Aug. 19, 2020).<sup>2</sup>

There are two methods to challenge a candidate's ability to appear on the general ballot. The first, under Chapter 141 of the Election Code, is a challenge to the candidate's application. Under Chapter 141, a candidate must comply with the "form, content, and procedure" requirements in submitting their application, including paying a filing fee. TEX. ELEC. CODE §§141.041; .032. If the candidate fails to comply, the party chair "***shall reject***" the application. TEX. ELEC. CODE § 142.032(a) (emph. added).

The second method, under Chapter 145, is a challenge to the candidate's "eligibility." TEX. ELEC. CODE § 145.035. This could include,

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<sup>2</sup> To assist minor party candidates, the Texas Secretary of State promulgated information aimed at helping these parties and their candidates navigate this procedure. *See* "Nominee of Libertarian or Green Party in 2020, Texas Secretary of State, available at <https://www.sos.state.tx.us/elections/candidates/guide/2020/lib-green-nom2020.shtml>.

for example, the candidate’s age, residence, or voter status. *See generally* TEX. ELEC. CODE § 145.001, *et. seq.* When presented with proof of ineligibility, the party chair must declare the candidate ineligible. TEX. ELEC. CODE § 145.035.

When a candidate fails to submit the required filing fee, there is confusion whether the appropriate challenge is to the application, under Chapter 141 or the eligibility under Chapter 145. The statute is less than crystal clear on this point, providing that “***To be eligible*** to be placed on the ballot for the general election . . . a candidate ***must***” pay a filing fee or submit a petition in lieu of a filing fee. TEX. ELEC. CODE § 141.041(a) (emph. added). At the same time, Chapter 141 provides that a challenge under this section, to provide the application, is not “a determination of a candidate’s eligibility.” TEX. ELEC. CODE § 141.034(b).

Adding to the confusion, courts and parties have intermingled these two challenges. *See In re Davis*. No. 03-20-00414-CV, 2020 Tex. App. Lexis 6663 (Tex. App.—Austin, Aug. 19, 2020, orig. proceeding) (granting mandamus relief challenging a minor candidate’s *eligibility* under Chapter 145 based on a candidate’s failure to pay the required filing fee).

Candidly, in the tight window to seek mandamus relief, many of the Relators fell in the same trap last week when they challenged certain Libertarian candidates *eligibility* under Chapter 145. The Third Court of Appeals denied that relief, finding it untimely.

But, as an analysis of the statutory scheme and case law bear out, a challenge to a candidate's failure to submit the application with the required filing fee is a challenge arising under Chapter 141.

This distinction is important because challenges to *application*—versus *eligibility*—have different timing requirements. The Third Court of Appeals concluded that a challenge to *eligibility* must be completed by the 74th day preceding the election. On the other hand, a party can challenge a candidate's application, including the failure to pay the filing fee “the day before any ballot to be voted early by mail is mailed . . .” TEX. ELEC. CODE § 141.032. That date is September 18.

Relators institute this new original proceeding under Texas Election Code Section 273.061, challenging the candidates' ability to appear on the general election ballot for failure to submit the required filing fee under Chapter 141. As this is a new action, requesting new relief, this is an appropriate original jurisdiction proceeding before this

Court. In this action, Relators ask the Court to compel the Libertarian Party of Texas and its Chair to comply with their statutory duty to reject these applications and to notify the Secretary of State of the rejection. If the Secretary of State is made aware of the rejection, it can take appropriate corrective action.

There is no question of timeliness in this challenge, as it can occur at any time prior to September 18. Practically, though, after August 28, the Secretary of State will begin to make arrangements to print and distribute ballots. Thus, timing is of the utmost importance. Should this Court issue relief, the Secretary of State can take corrective action through early September. However, each day closer to September 19—the date ballots are mailed—makes relief less practical.

### **Issue Presented**

- I. Texas Election Code Section 141.032 requires the Libertarian Party Chair to reject any application that fails to comply with the law, including paying the required filing fee. Several candidates failed to comply with election laws and pay the required filing fee with their application. Mandamus relief is appropriate to compel the Party and its Chair to comply with their legal duties to reject these applications.

## **Statement of Facts**

### **A. Libertarian Party candidates refuse to pay filing fees.**

Real Parties in Interest are Libertarian Party candidates are seeking positions in the Texas House, Texas Senate, the Supreme Court of Texas, and U.S. House of Representatives. MR.51-116; 24-26.<sup>3</sup>

None of the Real Parties in Interest paid the filing fee required by Texas law to appear on the ballot as a candidate for state or district office. MR.01-26. None of the Real Parties in Interest submitted a petition in lieu of paying the filing fee to secure their place on the ballot. MR.01-26. The fee or petition was due in December of 2019. *See* TEX. ELEC. CODE §§ 141.031, 172.023(a), 181.031-.033. Thus, the time has long passed for paying the filing fee or submit the petition.

### **B. Republican candidates are involved in each of the races.**

A Republican candidate for the Texas House, Texas Senate, the Supreme Court of Texas, and the U.S. House of Representatives is running in each election where the Real Parties in Interest who have failed to satisfy the requirements of Texas Election Code Section 141.041 purport to run. MR.51-116; 24-26. In contrast, candidates nominated by

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<sup>3</sup> *See also* “2020 Candidates,” Libertarian Party of Texas, *available at* [http://www.lptexas.org/2020\\_candidates](http://www.lptexas.org/2020_candidates).

the Republican Party for these seats have satisfied the requirements of Texas Election Code Section 141.041. *Id.* Inclusion of these candidates adversely effects Relators by requiring Republican candidates to compete against candidates that failed to pay the required filing fees and comply with election law. MR.39, 42, 44, 25.

Realtors in this action include an array of parties with a vested interest in seeing compliance with election laws. These include:

- Texas House Republican Caucus PAC;<sup>4</sup>
- National Republican Congressional Committee;<sup>5</sup>
- Senators Pete Flores (TX SD 19), Larry Taylor (TX SD 11), and Brandon Creighton (TX SD 4);<sup>6</sup>
- Reps. Cody Harris (TX HD 8), Justin Berry (TX HD 47), Rep. Phil King (TX HD 61), Rep. Phil Stephenson (TX HD 85). Rep. Candy Noble (TX HD 89), Rep. Dan

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<sup>4</sup> The Texas House Republican Caucus PAC Caucus includes all those Republican candidates vying for seats in elections in which the named Libertarian Party candidates seek to appear on the ballot. MR.119-21; MR.51-116. The Caucus has expended substantial amounts throughout Texas to support, recruit, and elect Republicans, including those involved in the races at issue. *Id.*; MR.42.

<sup>5</sup> The NRCC includes all incumbent Republican members of the U.S. House. MR.119-21. The NRCC has spent substantial amounts in Texas to develop and promote the Republican platform, to recruit Republican candidates for office, to coordinate fundraising, and to implement election strategies. *Id.*

<sup>6</sup> Relators are Republican candidates in Texas Senate races contested by the named Real Parties in Interest. MR.51-116.



Huberty (TX HD 127), Rep. Jim Murphy (TX HD 133), Rep. Valoree Swanson (TX HD 150);<sup>7</sup>

- Rep. Louis Gohmert (U.S. CD 1), Rep. Dan Crenshaw (U.S. CD 2), Rep. Van Taylor (U.S. CD 3), Wesley Hunt (U.S. CD 7), Rep. Michael McCaul (U.S. CD 10), Rep. Kay Granger (U.S. CD 12), Rep. Jodey Arrington (U.S. CD 19), Rep. Chip Roy (U.S. CD 21), Troy Nehls (U.S. CD 22), Tony Gonzales (U.S. CD 23), Beth Van Duyne (U.S. CD 24), Rep. Roger Williams (U.S. CD 25), Rep. Michael Cloud (U.S. CD 27), Rep. John Carter (U.S. CD 31), Genevieve Collins (U.S. CD 32), and Rep. Brian Babin (U.S. CD 36);<sup>8</sup> and
- Republican Party of Harris County, Republican Party of Travis County, and Republican Party of Tarrant County.<sup>9</sup>

The inclusion of candidates on the general election ballot that failed to comply with election law adversely affects each of the Relators. *Id.*; M.R.45-55; 119-21.

### **C. Respondents refuse to act.**

On August 20, 21, 22, and 25, 2020, Relators demanded the Libertarian Party of Texas and its Chair to reject the applications of the Real Parties in Interest that refused to pay the filing fee and inform the

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<sup>7</sup> Relators are Republican candidates in Texas House races contested by the named Real Parties in Interest. *Id.*

<sup>8</sup> Relators are Republican candidates in U.S. House races contested by the named Real Parties in Interest.

<sup>9</sup> These Relators represent the interests of the candidates in jurisdictions in which the Real Parties in Interest seek to appear on the ballot. *See, e.g.*, MR.44-46; 51-116.

Secretary of State of the rejection, MR.27-37. The correspondence included sworn and public records establishing that the candidates failed to comply with Chapter 141 by providing the required filing fees or petition in lieu of filing fees. *Id.*<sup>10</sup> Respondents refused to comply with the request or their legal obligation to review and reject these applications. MR.20-21; 119-21.

If this Court issues the requested relief, the Secretary of State can take appropriate corrective action. MR.119-21. Absent relief, Texas voters will receive ballots that include the names of Libertarian Party candidates for office who have failed to satisfy the requirements of Texas Election Code Section 141.041. Inclusion of candidates who fail to comply with election laws makes for an uneven playing field, with some candidates abiding by the law and paying filing fees while others don't. MR.44. The inclusion of candidates on the ballot who have failed to satisfy Texas Election Code Section 141.041 causes irreparable harm to Republican candidates for the Texas House, the Texas, Senate, the Supreme Court of Texas, and U.S. House of Representatives. MR.39, 42, 44-45.

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<sup>10</sup> The attached documents are reflected at Tabs 1-3 of the Mandamus Record.

## **Summary of Argument**

The Libertarian Party of Texas and its leaders have a statutory duty to ensure compliance with election laws and, when appropriate, reject the applications of candidates that disregard election laws, including failing to pay the required filing fee. When a party and its leaders refuse to perform their legal obligations, mandamus relief is appropriate.

Texas Election Code Section 141.041(a) mandates equal treatment by requiring all candidates to pay a filing fee to an election authority. Just like every other candidate for public office in Texas, Libertarian Party candidates must pay a filing fee (or submit a petition in lieu of a filing fee); otherwise, the Party and its Chair must reject the applications. A party can seek to compel compliance with this legal obligation at any time before September 18. Relators seek just that.

This Petition for Writ of Mandamus involves issues important to the State's jurisprudence, as it asks the Court to protect the route to office. Relators request that the Court grant this Petition for Writ of Mandamus, compel Respondents to comply with their legal obligations, and provide the requested relief.

## Argument

### **I. Respondents violated their statutory duty to reject the applications of candidates who failed to pay filing fees.**

#### **A. Candidates must submit an application and filing fees to appear on the ballot.**

“To be eligible to be placed on the ballot for the general election . . . a candidate ***must***” pay a filing fee or submit a petition in lieu of a filing fee. TEX. ELEC. CODE § 141.041(a) (emph. added). Secretary of state authority,<sup>11</sup> guidance,<sup>12</sup> and forms<sup>13</sup> all bear this out.

Absent compliance, candidates are not entitled to appear on the ballot. *Escobar v. Sutherland*, 917 S.W.2d 399, 404 (Tex. App—El Paso 1996, orig. proceeding) (“A candidate for public office must comply with all statutory requirements to be entitled have his or her name on the ballot.”) (citing *Brown v. Walker*, 377 S.W.2d 630, 632 (Tex. 1964)).

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<sup>11</sup>“HB 2504 **requires** that the application . . . be accompanied by either a **filing fee** or a petition in lieu of filing fee . . . **in order for the applicant to qualify for nomination.**” “Nominee of Libertarian or Green Party in 2020, Texas Secretary of State, *available at* <https://www.sos.state.tx.us/elections/candidates/guide/2020/lib-green-nom2020.shtml> (emph. added).

<sup>12</sup> See, e.g., Texas Secretary of State, *18th Biennial Seminar for County Chairs: Candidacy*, *available at* <https://www.sos.texas.gov/elections/forms/seminar/2017/18th/candidacy2017.pdf> (noting that “A candidate **must** also file, along with the application, the appropriate filing fee or a petition in lieu of filing fee.” Failure to do so, “**is fatal**” and the application must be rejected.) (emph. added).

<sup>13</sup> See MR.118.

B. The Election Code imposes legal duties on Respondents to review and reject applications.

The authority with whom the application is filed “**shall**” review the application to ensure that it complies, including the filing fee. TEX. ELEC. CODE § 141.032 (emph. added).<sup>14</sup> If the application does not comply, the authority “**shall reject**” the application. *Id.* at (e) (emph. added).

If the application does not comply, “the party chair has **no discretion but to reject the application** and remove the candidate’s name from the candidate list.” *In re Gamble*, 71 S.W.3d 313, 322 (Tex. 2002) (Baker, J. concurring) (emph. added) (citing TEX. ELEC. CODE § 141.032(e)); *see also In re Hopkins*, 181 S.W.3d 919, 924 (Tex. App.—Houston [14th Dist.] 2006) (citing TEX. ELEC. CODE § 141.032(e)) (“... the party chair **must reject** the application.”)) (emph. added).

Consistent with this legal duty, the application requires the Chair to sign and certify that the candidate has submitted the required filing fee or petition in lieu of the filing fee. MR.118.

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<sup>14</sup> *See also In re Wilson*, 421 S.W.3d 686, 689 (Tex. App.—Fort Worth 2014) (citing TEX. ELEC. CODE § 141.032(a)) (“...the authority with whom it is filed must review the application to determine whether it complies with the requirements as to form, content, and procedure that it must satisfy for the candidate's name to be placed on the ballot.”).

TO BE COMPLETED BY CHAIR OR DESIGNEE:			
(See Section 1.007)			
Voter Registration Status Verified <input type="checkbox"/>	Date Received	Date Accepted	Signature of Chair or Designee
Candidate submitted: (See Section 141.041)	<input type="checkbox"/> Petition in Lieu of a Filing Fee to Secretary of State/County Judge <input type="checkbox"/> Paid a filing fee to the Secretary of State/County Judge		
		<b>Print</b>	<b>Reset</b>

*Id.*

The Chair’s determination of compliance is not conclusive. TEX. ELEC. CODE § 141.032(d). The Election Code provides a method to challenge an application. TEX. ELEC. CODE § 141.034.<sup>15</sup>

C. Section 141.034 provides the vehicle to challenge a candidate’s failure to submit application and filing fee.

The Election Code “distinguishes between the requirements for eligibility to hold public office and the requirements for the form, content and procedure for a valid application.” *In re Meyer*, No. 05-16-00063-CV, 2016 Tex. App. LEXIS 1008, at \*12 (Tex. App.—Dallas Feb. 1, 2016, orig. proceeding). The two challenges implicate “differing responsibilities, differing Legislative grants of authority, and differing time tables, all of which emphasize that the declaration of ineligibility and the rejection of an application are two entirely separate procedures.” *Id.*

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<sup>15</sup> This is called a challenge to “form, content, and procedure,” distinguished from a challenge to eligibility. *Compare* TEX. ELEC. CODE §141.032 with 145.035.

Election Code Section 141.034 provides the vehicle to challenge a candidate's failure to submit an application with the required filing fee. TEX. ELEC. CODE §§ 141.034; .041. Plain text and statutory scheme bear this out, as does surrounding authority.<sup>16</sup> *Id.*; *see also In re Meyer*, 2016 Tex. App. LEXIS 1008, at \*12 (holding that Section 141.034 provides the method to challenge an application and filing requirements).<sup>17</sup>

On the other hand, Chapter 145 provides the method to challenge a candidate's eligibility. TEX. ELEC. CODE § 145.003. This section implicates questions such as citizenship, age, and residence requirements. TEX. ELEC. CODE § 145.001, *et seq.* But this is distinct from a candidate's application. *Id.*; *see also In re Hamlin*, No. 05-02-01416-CV,

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<sup>16</sup> Although this section includes the term “eligible,” Texas courts have held that the Texas Election Code distinguishes between the requirements for eligibility to hold public office and the requirements for the form, content, and procedure for a valid application. *In re Meyer*, 2016 Tex. App. LEXIS 1008, at \*12; *see also In re Hamlin*, 2002 Tex. App. LEXIS 6630, at \*4; *Escobar v. Sutherland*, 917 S.W.2d 399, 409 (Tex.App.-El Paso 1996, orig. proceeding). *In re Cercone*, 323 S.W.3d 393, 269-97 (Tex. App.—Dallas 2010, orig. proceeding).

<sup>17</sup> *C.f. In re Davis*, Cause No. 03-20-00414-CV (Aug. 19, 2020). The Third Court of Appeals granted mandamus relief under the guise of Section 145.035. But Section 145.003 does not govern challenges to requirements of “form, content, and procedure” under Section 141.032. Rather, Sections 141.032 regarding “Review of Applications; Notice to Candidates” and 141.034 regarding “Limitation on Challenge of Applications” governs challenges related to a candidate's failure to submit the required filing fee or petition in lieu of filing fee to appear on the ballot. Tex. Elec. Code §141.032. 034.

2002 Tex. App. LEXIS 6630, at \*4 (Tex. App.—Dallas Sep. 11, 2002) (noting the distinction between a challenge to application and eligibility).

Thus, to challenge an application, the party must state how the application does not comply with the form, content, and procedure requirements of Chapter 141, which includes the filing fee requirement. TEX. ELEC. CODE §§ 141.034(c); 141.041. If the application does not comply, the authority “***shall reject*** the application and immediately deliver to the candidate written notice of the reason for the rejection.” TEX. ELEC. CODE § 141.032(e) (emph. added). As statute and surrounding authority bear out, a challenge to the application and failure to pay a filing fee, is a challenge to the application under Chapter 141. *Id.*

This challenge can occur at any time before “the day before any ballot to be voted early by mail is mailed . . .” TEX. ELEC. CODE § 141.034(a). That date is September 18. Texas Election Advisory No. 2020-01 (noting that the date for mailing ballots is September 19).<sup>18</sup> A challenge to the application may occur at any time before that. *Id.* Thus, this challenge is timely.

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<sup>18</sup> Available at <https://www.sos.state.tx.us/elections/laws/advisory2020-01.shtml>.



D. Respondents refuse to comply with their legal duties to review and reject applications.

Real Parties in Interest are Libertarian Party candidates for positions in the Texas House of Representatives, the Texas Senate, the Supreme Court of Texas, and the Texas House of Representatives. MR.1-26; 51-116. Respondent, Whitney Bilyeu, the Chair of the Libertarian Party of Texas, is the election authority required to review candidate applications. TEX. ELEC. CODE § 141.032.

There is no factual dispute: none of the Real Parties in Interest paid the filing fee required by Texas law to appear on the ballot as a candidate for state or district office. MR.1-26. And none of the Real Parties in Interest submitted a petition in lieu of paying the filing fee to secure their place on the ballot. *Id.*

Despite their legal obligation to reject these applications under Texas Election Code Section 141.032, the Libertarian Party and its Chair accepted the applications and certified Real Parties in Interest for placement on the ballot without the legally required filing fee. MR.1-26; 51-116. The fee or petition was due in December of 2019. *See* TEX. ELEC. CODE *Id.* §§ 141.031, 172.023(a), 181.031-.033. The time has long passed to pay the filing fee or submit the petition.

Relators brought this to the attention of Respondents. MR.27-37. On August 20, 21, 22, and 25, Relators presented the Libertarian Party of Texas and its Chair, with: (1) sworn records showing no filing fee had been paid by Real Parties in Interest and no petition in lieu of paying the filing fee had been submitted by them; (2) public records showing the same. On August 25, Relators again demanded respondents to “reject these applications and immediately notify the Texas Secretary of State of their rejection.” MR.34. If the Secretary of State receives notice of rejection, it can take appropriate action to address the issue. MR.119-21. Still, Respondents refuse to comply with their legal obligations. *Id.*

The record presented to Ms. Bilyeu conclusively established that the Real Parties in Interest failed to comply with Chapter 141’s requirement to submit compliant application and filing fee. MR.27-37 (referencing MR.1-26). When, as here, a candidate fails to pay the required filing fee or submit a petition in lieu thereof to secure a place on the ballot, Ms. Bilyeu “***shall reject***” the application. TEX. ELEC. CODE § 141.032(e) (emph. added). Respondents have a legal obligation to reject the applications of Real Parties in Interest that failed to comply with Chapter 141. *See Cohen v. Rains*, 745 S.W.2d 949, 955 (Tex. App.—

Houston [14th Dist.] 1988) (orig. proceeding). Because of Relator's refusal comply with their statutory duty, mandamus relief is appropriate.

Legally, this action is timely brought before the deadline of September 18. TEX. ELEC. CODE § 141.034(a). Practically, though, after August 28, the Secretary of State will begin to make arrangements to print and distribute ballots. TEX. ELEC. CODE §161.008. Thus, timing is of the utmost importance. Relators understand that should this Court issue relief, the Secretary of State can take corrective action through early September. MR.119-21. However, each day closer to September 19—the date ballots are mailed—makes relief less practical. *Id.*

Relators request an order from this Court directing Ms. Bilyeu to: (1) reject the applications of Real Parties in Interest that failed to pay the filing fee or petition in lieu of the filing fee; (2) inform the Texas Secretary of State that the Libertarian Party of Texas has rejected the Real Party in Interests' applications; and (3) take all steps within her authority that are necessary to ensure that such Real Parties in Interest do not appear on the ballot.

## **II. Alternatively, Relators seek a declaration of ineligibility.**

The appropriate vehicle to challenge these candidates is under Chapter 141. But should the Court determine that this case is a challenge to *eligibility* under Chapter 145, Relators request this alternate relief compelling Ms. Bilyeu to: (1) declare Real Parties in Interest ineligible to appear general election ballots and (2) take all steps within her authority that are necessary to ensure that Real Parties in Interest do not appear on the ballot. A declaration of ineligibility is available at any time before October 4. (30 days before election day). TEX. ELEC. CODE § 145.003(d).<sup>19</sup>

## **III. Mandamus relief is appropriate.**

### **A. Respondents violated a clear legal right.**

Texas Election Code Section 273.061 authorizes a court of appeals to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.” *Id.* § 273.061.

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<sup>19</sup> A candidate may be declared ineligible at any time “before the 30th day preceding election day” (October 4). TEX. ELEC. CODE 145.003(d) (emph. added). When the candidate is ineligible, the authority responsible “shall declare the candidate ineligible,” and give appropriate notice. *Id.* at (g), (h), (i).

In addition, “[t]he performance of a duty placed by this code on an officer of a political party is enforceable by writ of mandamus in the same manner as if the party officer were a public officer.” *Id.* § 161.009. To be entitled to issuance of a writ of mandamus, Relators must establish “a clear legal right to performance of the acts [they seek] to compel, and the duties of the persons sought to be compelled must be clearly fixed and required by the law.” *See In re Watkins*, 465 S.W.3d 657, 659 (Tex. App.—Austin 2014, orig. proceeding). Relators have shown just that.

Respondents have violated a duty imposed by law by refusing to reject the applications of the Real Parties in Interest that failed to comply with Election Code Chapter 141 and pay the required filing fee. TEX. ELEC. CODE §§ 141.003; 141.041 141.032.

B. Relators are appropriate parties to obtain mandamus relief.

Relators in this action include an array of parties with a vested interest in seeing compliance with election laws. A Republican candidate for the Texas House of Representatives, the Texas Senate, the Supreme Court of Texas, and the U.S. House of Representatives is running in each election where the Real Parties in Interest who failed to comply with the requirements of “form, content, and procedure” under Texas Election

Code Section 141.032 purport to run, thereby affecting each Relator's respective interest. MR.51-116.

Each party is harmed by the inclusion of ineligible candidates on the general election ballot. M.R.27-37; 119-21.<sup>20</sup> Absent relief from this Court, this November Relators and their members will be required to compete with candidates who failed to follow the law to appear on the ballot. *Id.*

Relators have no adequate remedy at law because of the short time frame between certification (August 28) and distribution of ballots (September 19). If Real Parties in Interest are certified for inclusion and appear on the ballot, Relators will suffer irreparable harm. *Id.* Mandamus relief is appropriate because Ms. Bilyeu refuses to perform her statutory duty and Relators lack an adequate remedy at law because of the deadline for removing candidates from the November 2020 ballot is very near. For all these reasons, mandamus relief is appropriate.

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<sup>20</sup> See, e.g., *Libertarian Nat'l Comm., Inc. v. FEC*, 317 F. Supp. 3d 202, 226 (D.D.C. 2018) ( "Even if a Libertarian Party candidate does not win a federal election, the LNC generally views it as positive if its candidate gets more votes than the margin of victory between the two major-party candidates and thus affects the outcome of the election." *Id.* (internal citations omitted).

### **Conclusion & Prayer**

Relators request that this Court conditionally grant mandamus relief, directing Ms. Bilyeu and the Libertarian Party of Texas to: (1) reject the applications of Real Parties in Interest that failed to pay the filing fee or petition in lieu of the filing fee; (2) inform the Texas Secretary of State that the Libertarian Party of Texas has rejected the Real Party in Interests' applications; and (3) take all steps within her authority that are necessary to ensure that such Real Parties in Interest do not appear on the ballot. Alternatively, Relators alternatively request that the Court direct Ms. Bilyeu and the Libertarian Party of Texas to declare these candidates ineligible. Relators also requests all other relief to which they may show themselves justly entitled.

Respectfully Submitted,

By: /s/ Tyler Talbert

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### **Mandamus Certification**

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

**/s/ Tyler B. Talbert**

Tyler B. Talbert

### **Certificate of Compliance**

In compliance with the Texas Rule of Appellate Procedure, I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 4,445.

**/s/ Tyler B. Talbert**

Tyler B. Talbert

## Certificate of Service

I certify that on August 26, 2020, this document was served via the electronic filing system, email, or by mail (as indicated below) on Respondents and Real Parties in Interest.

/s/ Tyler Talbert

Tyler Talbert

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**Phil Kurtz**

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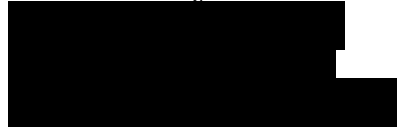
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**Chad Abbey**



# Tab 1

## **Tex. Elec. Code § 273.061**

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

***Texas Statutes & Codes Annotated by LexisNexis® > Election Code > Title 16 Miscellaneous Provisions (Chs. 271 — 279) > Chapter 273 Criminal Investigation and Other Enforcement Proceedings (Subchs. A — E) > Subchapter D Mandamus By Appellate Court (§§ 273.061 — 273.080)***

### **Sec. 273.061. Jurisdiction.**

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The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.

### **History**

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Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986.

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# Tab 2



## [Tex. Elec. Code § 141.041](#)

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

***Texas Statutes & Codes Annotated by LexisNexis® > Election Code > Title 9 Candidates (Chs. 141 — 146) > Chapter 141 Candidacy for Public Office Generally (Subchs. A — C) > Subchapter B Application for Place On Ballot (§§ 141.031 — 141.060)***

### **Sec. 141.041. Filing Fee or Petition to Appear on Ballot for General Election for State and County Officers.**

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(a) In addition to any other requirements, to be eligible to be placed on the ballot for the general election for state and county officers, a candidate who is nominated by convention under Chapter 181 or 182 must:

(1) pay a filing fee to the secretary of state for a statewide or district office or the county judge for a county or precinct office; or

(2) submit to the secretary of state for a statewide or district office or the county judge for a county or precinct office a petition in lieu of a filing fee that satisfies the requirements prescribed by Subsection (e) and Section 141.062.

(b) The amount of the filing fee is the amount prescribed by Section 172.024 for a candidate for nomination for the same office in a general primary election.

(c) A filing fee received by the secretary of state shall be deposited in the state treasury to the credit of the general revenue fund.

(d) A filing fee received by the county judge shall be deposited in the county treasury to the credit of the county general fund.

(e) The minimum number of signatures that must appear on the petition authorized by Subsection (a) is the number prescribed by Section 172.025 to appear on a petition of a candidate for nomination for the same office in a general primary election.

(f) The secretary of state shall adopt rules as necessary to implement this section.

### **History**

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Enacted by [Acts 2019, 86th Leg., ch. 822 \(H.B. 2504\), § 1](#), effective September 1, 2019.

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# Tab 3

## [Tex. Elec. Code § 141.034](#)

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

***Texas Statutes & Codes Annotated by LexisNexis® > Election Code > Title 9 Candidates (Chs. 141 — 146) > Chapter 141 Candidacy for Public Office Generally (Subchs. A — C) > Subchapter B Application for Place On Ballot (§§ 141.031 — 141.060)***

### **Sec. 141.034. Limitation on Challenge of Application.**

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(a) An application for a place on the ballot may not be challenged for compliance with the applicable requirements as to form, content, and procedure after the day before any ballot to be voted early by mail is mailed to an address in the authority's jurisdiction for the election for which the application is made.

(b) This section does not apply to a determination of a candidate's eligibility.

(c) A challenge must state with specificity how the application does not comply with the applicable requirements as to form, content, and procedure. The authority's review of the challenge is limited to the specific items challenged and any response filed with the authority by the challenged candidate.

### **History**

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Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986; am. *Acts 1989, 71st Leg., ch. 2 (S.B. 221), § 7.07*, effective August 28, 1989; am. Acts 1991, 72nd Leg., ch. 203 (S.B. 1234), § [2.57](#), effective September 1, 1991; am. Acts 1991, 72nd Leg., ch. 554 (S.B. 1186), § [28](#), effective September 1, 1991; am. Acts 1993, 73rd Leg., ch. 728 (H.B. 75), § [55](#), effective September 1, 1993; am. [Acts 2017, 85th Leg., ch. 95 \(S.B. 44\), § 2](#), effective May 23, 2017.

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# Tab 4

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00421-CV  
NO. 03-20-00422-CV**

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**In re the National Republican Congressional Committee and Van Taylor**

**In re Republican Party of Travis County, Texas**

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**ORIGINAL PROCEEDING**

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**OPINION**

Relators, the National Republican Congressional Committee (RNCC); Van Taylor; and the Republican Party of Travis County, Texas, seek writs of mandamus ordering respondents, the Libertarian Party of Texas; Whitney Bilyeu, in her capacity as the Chair of the Libertarian Party of Texas; and Rebekah Congdon, in her capacity as Vice Chair of the Libertarian Party of Texas, to (1) declare the real parties in interest, who are candidates for various statewide offices, ineligible to appear as the Libertarian Party candidates on the November 2020 general election ballot and (2) take all steps within their authority that are necessary to ensure that those candidates' names do not appear on the ballot.<sup>1</sup> Relators assert that the real parties in interest have not complied with the Texas Election Code provision

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<sup>1</sup> Rebekah Congdon, in her capacity as Vice Chair of the Libertarian Party of Texas, is only identified as a respondent in cause number 03-20-00421-CV, but for simplicity, we refer to "respondents" collectively, meaning the Libertarian Party of Texas, Bilyeu, and Congdon for cause number 03-20-00421-CV, and meaning the Libertarian Party of Texas and Bilyeu for cause number 03-20-00422-CV.

requiring them to pay a filing fee or submit a petition in lieu of a filing fee to be eligible to appear on the ballot. *See* Tex. Elec. Code § 141.041(a). Relators further assert that respondents were presented with conclusive proof that the real parties in interest are ineligible for this reason, but respondents have failed to comply with their statutory duty to declare them ineligible to appear on the November 2020 general election ballot as the Libertarian Party candidates. *See id.* § 145.003(b), (f), (g). For the reasons explained below, we dismiss the petitions for writ of mandamus as moot.

### **BACKGROUND**

Texas Election Code Section 145.003 establishes that candidates in the general election for state and county officers may be declared ineligible only by “the party officer responsible for certifying the candidate’s name for placement on the general election ballot, in the case of a candidate who is a political party’s nominee.” *See id.* § 145.003(b). Section 145.003 provides that a candidate may be declared ineligible if “facts indicating that the candidate is ineligible are conclusively established by another public record.” *Id.* § 145.003(f). An ineligible candidate must be removed from the ballot if declared ineligible on or before the 74th day before election day, which for the election at issue here was Friday, August 21, 2020. *See id.* § 145.035.

Late in the evening of Thursday, August 20, 2020, counsel for relator RNCC sent an e-mail asking respondents to withdraw 27 of their candidates, the real parties in interest, from the ballot. Relator requested a response within two hours. The next morning, August 21, 2020,

relator RNCC filed its mandamus petition (cause number 03-20-0421-CV).<sup>2</sup> Relator Republican Party of Travis County, Texas, filed its mandamus petition that evening at 9:19 p.m. (cause number 03-20-00422-CV) after asking respondents to withdraw two candidates for the Texas Supreme Court and providing respondents two hours to respond.

Due process and the Texas Rules of Appellate Procedure require that an appellate court must not grant relief in a mandamus proceeding (other than temporary relief) “before a response has been filed or requested by the court.” Tex. R. App. P. 52.4; *see also In re Victor Enters., Inc.*, 304 S.W.3d 669, 669 (Tex. App.—Dallas 2010, orig. proceeding) (holding trial court erred by granting mandamus petition without requesting response and providing time for response). Accordingly, this Court requested a response on an expedited basis, one business day later. To assure due process to the real parties in interest, the Court further required relators to provide contact information for each person whose candidacy was being challenged. This information was provided Friday afternoon, and the Court issued notice to them. One letter response from respondents challenging relators’ standing was filed by the Court’s deadline, followed by a request from respondents’ newly hired counsel requesting an additional day to file a brief in response.

## ANALYSIS

“The law is clear that a challenge to the candidacy of an individual becomes moot ‘when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.’” *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.) (quoting *Polk v. Davidson*, 196 S.W.2d 632, 634 (Tex. 1946) (orig. proceeding)).

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<sup>2</sup> Relator Van Taylor, a candidate for the Texas 3rd Congressional District, subsequently filed a motion to intervene in cause number 03-20-00421-CV, which was granted by the Court.

“If a challenge to a candidate’s eligibility ‘cannot be tried and a final decree entered in time for compliance with pre-election statutes by officials charged with the duty of preparing for the holding of the election,’ we must dismiss the challenge as moot.” *Id.* (quoting *Smith v. Crawford*, 747 S.W.2d 938, 940 (Tex. App.—Dallas 1988, orig. proceeding)).

The Texas Election Code provides that “[a] candidate’s name shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible on or before the 74th day before election day.” Tex. Elec. Code § 145.035. However, “[i]f a candidate dies or is declared ineligible after the 74th day before election day, the candidate’s name shall be placed on the ballot.” *Id.* § 145.039. “If the name of a deceased, withdrawn, or ineligible candidate appears on the ballot under this chapter, the votes cast for the candidate shall be counted and entered on the official election returns in the same manner as for the other candidates.” *Id.* § 145.005(a).

Because relators waited to file their challenge to a total of 30 candidates until the last possible day this Court could grant the relief they seek, they made it impossible for the Court to obtain the information and briefing needed to afford due process and make a reasoned decision until less than 74 days remained before election day. Accordingly, even if this Court were to conclude based on the mandamus record that respondents have a statutory duty to declare the real parties in interest ineligible, their names would remain on the ballot and any votes cast for them would be counted. *See id.* §§ 145.039, .005(a); *see also Brimer*, 265 S.W.3d at 928 (holding that challenge to candidate’s eligibility for general election becomes moot when it cannot be tried and final decree entered in time for compliance with pre-election statutes); *accord Smith*, 747 S.W.2d at 940 (“This is true, even though the contestant may have good cause or grounds for the contest.”) (citing *Cummins v. Democratic Exec. Comm’n*,



97 S.W.2d 368, 369 (Tex. App.—Austin 1936, no writ)). No order that this Court might enter would be effective to change this result. The Republican Party candidates’ only legally recognized interest in pursuing this mandamus is to avoid being opposed by an ineligible candidate—an outcome that we cannot, at this point, change. See *In re Sherman*, No. 01-10-00070-CV, 2010 WL 375799, at \*1 (Tex. App.—Houston [1st Dist.] Feb. 3, 2010, orig. proceeding); see also *In re Osborn*, No. 03-13-00314-CV, 2013 WL 2157712, at \*2 (Tex. App.—Austin May 15, 2013, orig. proceeding) (dismissing mandamus petition filed after statutory deadline for want of jurisdiction because once candidate’s name could no longer be removed from ballot, any attack on candidate’s eligibility must be brought by State in quo warranto proceeding). Therefore, these mandamus proceedings are dismissed as moot.<sup>3</sup>

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Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Baker and Kelly  
Dissenting Opinion by Chief Justice Rose

Filed: August 25, 2020

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<sup>3</sup> We note that relators seek the same relief that was sought and granted in our recent opinion, *In re Davis*, No. 03-20-00414-CV, \_\_S.W.3d\_\_, 2020 WL 4931747 (Tex. App.—Austin Aug. 19, 2020, orig. proceeding). There, the petition for mandamus was filed four business days before the statutory deadline. To assure due process to respondents, this Court required responses in one business day, the same as it did here. And in *In re Davis*, the candidates themselves brought the challenge. While it is clear that “a candidate for the same office has ‘an interest in not being opposed by an ineligible candidate,’” *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.) (quoting *In re Jones*, 978 S.W.2d 648, 651 (Tex. App.—Amarillo 1998, orig. proceeding [mand. denied]) (per curiam)), respondents in this proceeding challenge whether political parties have an interest sufficient to confer standing to pursue mandamus relief. See *Colvin v. Ellis Cnty. Republican Exec. Comm’n*, 719 S.W.2d 265, 266 (Tex. App.—Waco 1986, no writ) (holding that “voter” who was opposing political party’s chair had no justiciable interest apart from general public and could not bring suit to enjoin candidacy of ineligible

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candidates). We need not reach this issue or the other legal and evidentiary arguments raised by respondents because we are disposing of the mandamus petitions based on mootness.

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00421-CV  
NO. 03-20-00422-CV**

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**In re the National Republican Congressional Committee and Van Taylor**

**In re Republican Party of Travis County, Texas**

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**ORIGINAL PROCEEDING**

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**DISSENTING OPINION**

Consistent with my previous dissent from this Court’s removal of Green Party candidates from the ballot in response to an eleventh-hour mandamus, *see In re Davis*, No. 03-20-00414-CV, 2020 WL 4929783 (Tex. App.—Austin Aug. 19, 2020) (orig. proceeding) (Rose, C.J., dissenting), I would here again deny mandamus relief ordering party chairs to take steps to remove Libertarian candidates from the November ballot. These mandamus proceedings were filed at the twelfth hour, and we have now passed the Election Code’s clear deadline for removing a candidate’s name from the ballot. *See* Tex. Elec. Code §§ 145.035, .039. In both instances, the last-minute, rushed filings and sparse records render an appellate court original proceeding too blunt a tool for removal of voters’ choices from the ballot.

However, with the candidates’ names now fixed on the ballot and the precedent set by this Court in *In re Davis*, No. 03-20-00414-CV, 2020 WL 4931747 (Aug. 19, 2020) (orig. proceeding) (ordering candidates in the same circumstances to be declared ineligible and

removed from the November ballot), I disagree with the majority's conclusion that the relators are left with no legally cognizable interest in determining their opponents' eligibility. Although the deadline for removing a candidate's name from the ballot may have passed, a person's eligibility under the Election Code affects not only whether that person can be a candidate, but also whether the person can be elected to a public office. *See, e.g.*, Tex. Elec. Code § 141.001(a). Moreover, the Election Code contains provisions that implicate eligibility without regard to the 74-day deadline. For example, candidates may be declared ineligible up to the 30th day preceding election day under certain circumstances, including where, as alleged here, the party chair has been presented with information establishing ineligibility. *See id.* § 145.003(b) (30-day deadline), (g) (requiring party chair to declare candidate ineligible if record establishes ineligibility). The fact that this deadline to declare a candidate ineligible is 30 days before the general election but the deadline to remove a candidate from the ballot is 74 days before the election demonstrates that the Legislature found the declaration of ineligibility meaningful even after the statutory deadline for removing a candidate's name from the ballot has passed. As such, relators have a cognizable interest in the eligibility of their opponents, regardless of ballot content.

Accordingly, rather than dismiss these proceedings as moot, we should address the merits of relators' eligibility challenges after allowing adequate time for briefing.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Kelly

Filed: August 25, 2020

# Tab 5

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00421-CV  
NO. 03-20-00422-CV**

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**In re the National Republican Congressional Committee and Van Taylor**

**In re Republican Party of Travis County, Texas**

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**ORIGINAL PROCEEDING**

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**OPINION**

Relators, the National Republican Congressional Committee (RNCC); Van Taylor; and the Republican Party of Travis County, Texas, seek writs of mandamus ordering respondents, the Libertarian Party of Texas; Whitney Bilyeu, in her capacity as the Chair of the Libertarian Party of Texas; and Rebekah Congdon, in her capacity as Vice Chair of the Libertarian Party of Texas, to (1) declare the real parties in interest, who are candidates for various statewide offices, ineligible to appear as the Libertarian Party candidates on the November 2020 general election ballot and (2) take all steps within their authority that are necessary to ensure that those candidates' names do not appear on the ballot.<sup>1</sup> Relators assert that the real parties in interest have not complied with the Texas Election Code provision

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<sup>1</sup> Rebekah Congdon, in her capacity as Vice Chair of the Libertarian Party of Texas, is only identified as a respondent in cause number 03-20-00421-CV, but for simplicity, we refer to "respondents" collectively, meaning the Libertarian Party of Texas, Bilyeu, and Congdon for cause number 03-20-00421-CV, and meaning the Libertarian Party of Texas and Bilyeu for cause number 03-20-00422-CV.

requiring them to pay a filing fee or submit a petition in lieu of a filing fee to be eligible to appear on the ballot. *See* Tex. Elec. Code § 141.041(a). Relators further assert that respondents were presented with conclusive proof that the real parties in interest are ineligible for this reason, but respondents have failed to comply with their statutory duty to declare them ineligible to appear on the November 2020 general election ballot as the Libertarian Party candidates. *See id.* § 145.003(b), (f), (g). For the reasons explained below, we dismiss the petitions for writ of mandamus as moot.

### **BACKGROUND**

Texas Election Code Section 145.003 establishes that candidates in the general election for state and county officers may be declared ineligible only by “the party officer responsible for certifying the candidate’s name for placement on the general election ballot, in the case of a candidate who is a political party’s nominee.” *See id.* § 145.003(b). Section 145.003 provides that a candidate may be declared ineligible if “facts indicating that the candidate is ineligible are conclusively established by another public record.” *Id.* § 145.003(f). An ineligible candidate must be removed from the ballot if declared ineligible on or before the 74th day before election day, which for the election at issue here was Friday, August 21, 2020. *See id.* § 145.035.

Late in the evening of Thursday, August 20, 2020, counsel for relator RNCC sent an e-mail asking respondents to withdraw 27 of their candidates, the real parties in interest, from the ballot. Relator requested a response within two hours. The next morning, August 21, 2020,

relator RNCC filed its mandamus petition (cause number 03-20-0421-CV).<sup>2</sup> Relator Republican Party of Travis County, Texas, filed its mandamus petition that evening at 9:19 p.m. (cause number 03-20-00422-CV) after asking respondents to withdraw two candidates for the Texas Supreme Court and providing respondents two hours to respond.

Due process and the Texas Rules of Appellate Procedure require that an appellate court must not grant relief in a mandamus proceeding (other than temporary relief) “before a response has been filed or requested by the court.” Tex. R. App. P. 52.4; *see also In re Victor Enters., Inc.*, 304 S.W.3d 669, 669 (Tex. App.—Dallas 2010, orig. proceeding) (holding trial court erred by granting mandamus petition without requesting response and providing time for response). Accordingly, this Court requested a response on an expedited basis, one business day later. To assure due process to the real parties in interest, the Court further required relators to provide contact information for each person whose candidacy was being challenged. This information was provided Friday afternoon, and the Court issued notice to them. One letter response from respondents challenging relators’ standing was filed by the Court’s deadline, followed by a request from respondents’ newly hired counsel requesting an additional day to file a brief in response.

## ANALYSIS

“The law is clear that a challenge to the candidacy of an individual becomes moot ‘when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.’” *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.) (quoting *Polk v. Davidson*, 196 S.W.2d 632, 634 (Tex. 1946) (orig. proceeding)).

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<sup>2</sup> Relator Van Taylor, a candidate for the Texas 3rd Congressional District, subsequently filed a motion to intervene in cause number 03-20-00421-CV, which was granted by the Court.



“If a challenge to a candidate’s eligibility ‘cannot be tried and a final decree entered in time for compliance with pre-election statutes by officials charged with the duty of preparing for the holding of the election,’ we must dismiss the challenge as moot.” *Id.* (quoting *Smith v. Crawford*, 747 S.W.2d 938, 940 (Tex. App.—Dallas 1988, orig. proceeding)).

The Texas Election Code provides that “[a] candidate’s name shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible on or before the 74th day before election day.” Tex. Elec. Code § 145.035. However, “[i]f a candidate dies or is declared ineligible after the 74th day before election day, the candidate’s name shall be placed on the ballot.” *Id.* § 145.039. “If the name of a deceased, withdrawn, or ineligible candidate appears on the ballot under this chapter, the votes cast for the candidate shall be counted and entered on the official election returns in the same manner as for the other candidates.” *Id.* § 145.005(a).

Because relators waited to file their challenge to a total of 30 candidates until the last possible day this Court could grant the relief they seek, they made it impossible for the Court to obtain the information and briefing needed to afford due process and make a reasoned decision until less than 74 days remained before election day. Accordingly, even if this Court were to conclude based on the mandamus record that respondents have a statutory duty to declare the real parties in interest ineligible, their names would remain on the ballot and any votes cast for them would be counted. *See id.* §§ 145.039, .005(a); *see also Brimer*, 265 S.W.3d at 928 (holding that challenge to candidate’s eligibility for general election becomes moot when it cannot be tried and final decree entered in time for compliance with pre-election statutes); *accord Smith*, 747 S.W.2d at 940 (“This is true, even though the contestant may have good cause or grounds for the contest.”) (citing *Cummins v. Democratic Exec. Comm’n*,

97 S.W.2d 368, 369 (Tex. App.—Austin 1936, no writ)). No order that this Court might enter would be effective to change this result. The Republican Party candidates’ only legally recognized interest in pursuing this mandamus is to avoid being opposed by an ineligible candidate—an outcome that we cannot, at this point, change. See *In re Sherman*, No. 01-10-00070-CV, 2010 WL 375799, at \*1 (Tex. App.—Houston [1st Dist.] Feb. 3, 2010, orig. proceeding); see also *In re Osborn*, No. 03-13-00314-CV, 2013 WL 2157712, at \*2 (Tex. App.—Austin May 15, 2013, orig. proceeding) (dismissing mandamus petition filed after statutory deadline for want of jurisdiction because once candidate’s name could no longer be removed from ballot, any attack on candidate’s eligibility must be brought by State in quo warranto proceeding). Therefore, these mandamus proceedings are dismissed as moot.<sup>3</sup>

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Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Baker and Kelly  
Dissenting Opinion by Chief Justice Rose

Filed: August 25, 2020

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<sup>3</sup> We note that relators seek the same relief that was sought and granted in our recent opinion, *In re Davis*, No. 03-20-00414-CV, \_\_S.W.3d\_\_, 2020 WL 4931747 (Tex. App.—Austin Aug. 19, 2020, orig. proceeding). There, the petition for mandamus was filed four business days before the statutory deadline. To assure due process to respondents, this Court required responses in one business day, the same as it did here. And in *In re Davis*, the candidates themselves brought the challenge. While it is clear that “a candidate for the same office has ‘an interest in not being opposed by an ineligible candidate,’” *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.) (quoting *In re Jones*, 978 S.W.2d 648, 651 (Tex. App.—Amarillo 1998, orig. proceeding [mand. denied]) (per curiam)), respondents in this proceeding challenge whether political parties have an interest sufficient to confer standing to pursue mandamus relief. See *Colvin v. Ellis Cnty. Republican Exec. Comm’n*, 719 S.W.2d 265, 266 (Tex. App.—Waco 1986, no writ) (holding that “voter” who was opposing political party’s chair had no justiciable interest apart from general public and could not bring suit to enjoin candidacy of ineligible

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candidates). We need not reach this issue or the other legal and evidentiary arguments raised by respondents because we are disposing of the mandamus petitions based on mootness.

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00421-CV  
NO. 03-20-00422-CV**

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**In re the National Republican Congressional Committee and Van Taylor**

**In re Republican Party of Travis County, Texas**

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**ORIGINAL PROCEEDING**

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**DISSENTING OPINION**

Consistent with my previous dissent from this Court’s removal of Green Party candidates from the ballot in response to an eleventh-hour mandamus, *see In re Davis*, No. 03-20-00414-CV, 2020 WL 4929783 (Tex. App.—Austin Aug. 19, 2020) (orig. proceeding) (Rose, C.J., dissenting), I would here again deny mandamus relief ordering party chairs to take steps to remove Libertarian candidates from the November ballot. These mandamus proceedings were filed at the twelfth hour, and we have now passed the Election Code’s clear deadline for removing a candidate’s name from the ballot. *See* Tex. Elec. Code §§ 145.035, .039. In both instances, the last-minute, rushed filings and sparse records render an appellate court original proceeding too blunt a tool for removal of voters’ choices from the ballot.

However, with the candidates’ names now fixed on the ballot and the precedent set by this Court in *In re Davis*, No. 03-20-00414-CV, 2020 WL 4931747 (Aug. 19, 2020) (orig. proceeding) (ordering candidates in the same circumstances to be declared ineligible and

removed from the November ballot), I disagree with the majority's conclusion that the relators are left with no legally cognizable interest in determining their opponents' eligibility. Although the deadline for removing a candidate's name from the ballot may have passed, a person's eligibility under the Election Code affects not only whether that person can be a candidate, but also whether the person can be elected to a public office. *See, e.g.,* Tex. Elec. Code § 141.001(a). Moreover, the Election Code contains provisions that implicate eligibility without regard to the 74-day deadline. For example, candidates may be declared ineligible up to the 30th day preceding election day under certain circumstances, including where, as alleged here, the party chair has been presented with information establishing ineligibility. *See id.* § 145.003(b) (30-day deadline), (g) (requiring party chair to declare candidate ineligible if record establishes ineligibility). The fact that this deadline to declare a candidate ineligible is 30 days before the general election but the deadline to remove a candidate from the ballot is 74 days before the election demonstrates that the Legislature found the declaration of ineligibility meaningful even after the statutory deadline for removing a candidate's name from the ballot has passed. As such, relators have a cognizable interest in the eligibility of their opponents, regardless of ballot content.

Accordingly, rather than dismiss these proceedings as moot, we should address the merits of relators' eligibility challenges after allowing adequate time for briefing.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Kelly

Filed: August 25, 2020

# Tab 6

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00424-CV**

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**In re Texas House Republican Caucus PAC, Senator Brandon Creighton (SD 4),  
Senator Larry Taylor (SD 11), Senator Pete Flores (SD 19), Rep. Cody Harris (HD 8),  
Justin Berry (HD 47), Rep. Phil King (HD 61), Rep. Phil Stephenson (HD 85),  
Rep. Candy Noble (HD 89), Rep. Dan Huberty (HD 127), Rep. Jim Murphy (HD 133),  
Rep. Valoree Swanson (HD 150), Republican Party of Harris County,  
Republican Party of Travis County, and Republican Party of Tarrant County**

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**ORIGINAL PROCEEDING**

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**MEMORANDUM OPINION**

Relators filed their petition for writ of mandamus three days after the statutory deadline to have ineligible candidates' names omitted from the ballot. *See* Tex. Elec. Code § 145.035; *see also id.* § 145.039 (“If a candidate dies or is declared ineligible after the 74th day before election day, the candidate’s name shall be placed on the ballot.”). Relevant here, the 74th day before election day was August 21, 2020. Accordingly, the petition for writ of mandamus is dismissed as moot. *See In re The National Republican Congressional Committee*, Nos. 03-20-00421-CV & 03-20-00422-CV, --- S.W.3d --- (Tex. App.—Austin Aug. 25, 2020, orig. proceeding).

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Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Baker and Kelly  
Dissenting Opinion by Chief Justice Rose

Filed: August 25, 2020



**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00424-CV**

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**In re Texas House Republican Caucus PAC, Senator Brandon Creighton (SD 4),  
Senator Larry Taylor (SD 11), Senator Pete Flores (SD 19), Rep. Cody Harris (HD 8),  
Justin Berry (HD 47), Rep. Phil King (HD 61), Rep. Phil Stephenson (HD 85),  
Rep. Candy Noble (HD 89), Rep. Dan Huberty (HD 127), Rep. Jim Murphy (HD 133),  
Rep. Valoree Swanson (HD 150), Republican Party of Harris County,  
Republican Party of Travis County, and Republican Party of Tarrant County**

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**ORIGINAL PROCEEDING**

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**DISSENTING OPINION**

For the reasons expressed in my dissent to the Court's decision in *In re the National Republican Congressional Committee and Van Taylor*, No. 03-20-00421-CV, and *In re Republican Party of Travis County, Texas*, No. 03-20-00422-CV, I respectfully dissent from the Court's opinion in this case.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Kelly

Filed: August 25, 2020

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Ed Kless
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Libertarian Party of Texas
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